

Editor's note: Appealed -- dismissed for failure to exhaust, Civ. No. 5695 (D.Wyo. Dec. 26, 1973); order amending judgment Feb. 15, 1974

AMERICAN TELEPHONE AND TELEGRAPH COMPANY ET AL.

IBLA 72-336, 74-150, 74-336, IBLA 75-230 Decided June 30, 1976

Appeals from separate determinations of various State Offices of the Bureau of Land Management, imposing increased charges for use and occupancy of 14 microwave communication sites. See Appendix I, p. 361.

Set aside and remanded.

1. Administrative Procedure: Hearings--Appraisals-- Communication Sites--Hearings--Rights-of-Way: Act of March 4, 1911

Under 43 CFR 2802.1-7(e), which provides that charges for use and occupancy of a communication site on public lands may be revised after notice and an opportunity for hearing, it is improper to increase such charges without following the prescribed procedure.

2. Administrative Procedure: Hearings--Communication Sites --Evidence: Official Notice--Hearings--Rights-of-Way: Act of March 4, 1911

Following a hearing under 43 CFR 2802.1-7, a decision increasing the charges for use and occupancy of a communication site is in error to the extent that the decision is based upon unspecified evidence not in the record and not made known to the user, and the decision must be set aside.

3. Appraisals--Communication Sites--Rights-of-Way: Act of March 4, 1911

Under 602 DM 1.3, standards for evaluating easements granted by the Department are set forth in Interagency Land Acquisition Conference, Uniform Appraisal Standards for Federal Land Acquisitions.

4. Appraisals--Communication Sites--Rights-of-Way: Act of March 4, 1911--Words and Phrases

"Fair market value." As used in 43 CFR 2802.1-7, "fair market value" of a communication site right-of-way is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desired but is not obligated to so use.

5. Appraisals--Communication Sites--Rights-of-Way: Act of March 4, 1911

The comparable lease method of appraisal of microwave communication sites, which involves the comparison of comparable rental data from other leased sites with data from the subject site, is a proper method of determining the fair market value of such site where there is sufficient comparable data available.

6. Appraisals--Communication Sites--Rights-of-Way: Act of March 4, 1911

Under 43 CFR 2802.1-7(e), a revision of charges for use and occupancy of a microwave communication site should be based upon the physical condition of the right-of-way at the time the user properly commenced occupancy of the site or at time

of grant thereof, whichever was earlier, with value adjusted to present value in that condition.

7. Appraisals--Communication Sites--Rights-of-Way: Act of March 4, 1911--Words and Phrases

"Highest and best use." As to the improver of a communication site during the term of his grant, a determination that the highest and best use of property is for communications purposes must be based on evidence showing it is so reasonably likely the site would be chosen for use as a communication site in the absence of improvements made by the improver that the suitability of the land for communications purposes would affect its general market value.

8. Appraisals--Communication Sites--Rights-of-Way: Act of March 4, 1911--Words and Phrases

"Before and after rule." In reappraisal of a communication site, the before and after rule is applied by determining the market value of the government tract including the site at the time of reappraisal, excluding any enhancement to or diminution from the site project, and subtracting therefrom the market value of the remaining government property interest, including enhancement or diminution from the project.

9. Appraisals--Communication Sites--Rights-of-Way: Act of March 4, 1911

In the absence of better evidence of comparable leases, the "before and after" method should be employed in appraisals of communication sites under 43 CFR 2802.1-7.

10. Administrative Procedure: Hearings--Appraisals-- Communication Sites--Rights-of-Way: Act of March 4, 1911--Rules of Practice: Hearings

In a case where a substantial increase is proposed in charges for a communication site under 43 CFR 2802.1-7(e), the required hearing should be conducted in accordance with the accepted concepts of due process.

El Paso Natural Gas Company, A-30528 (August 25, 1965), distinguished.

APPEARANCES: Francine J. Berry and Richard A. Bromley, Esqs., Jean C. Gaskill, Esq., Brobeck, Phleger and Harrison, San Francisco, California, for appellant; American Telephone and Telegraph Company (AT&T). Eugene L. Freeland, Esq., Gray, Cary, Ames, and Frye, and William F. Anderson, Esq., San Diego, California, for appellant; Pacific Telephone and Telegraph Company (PT&T). Bruce P. Moore, Esq., Office of the Solicitor, Department of the Interior, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE GOSS

These are consolidated appeals from determinations of various State Offices of the Bureau of Land Management (BLM), increasing the charges to be paid by appellants for certain rights-of-way for microwave transmission sites and access on the public domain. 1/ The cases have been consolidated at appellants' request because they share similar factual situations and common issues. The appeals are as follows:

IBLA 72-336, Wyoming Sites: American Telephone and Telegraph Company protested increased charges for Rock River (W-0165715) and Creston (W-0165717) sites. The protest was dismissed and the rights-of-way held for

1/ Two companion cases are being ruled upon by separate decision and order:

IBLA 73-421: Appellant, Mountain States Telephone and Telegraph Company, appeals from the May 10, 1973, decision of the Idaho State Office setting the initial charges in connection with an application for the Squaw Butte site (I 5769).

IBLA 74-34: AT&T appeals the Nevada State Office decision dated June 20, 1973, which imposes increased charges for Stillwater (NEV 057071) and Wildhorse (NEV 057098).

cancellation by the Wyoming State Office, BLM, by decision dated February 16, 1972. AT&T appealed to this Board and also sought review of the reappraisals in the United States District Court for the District of Wyoming. The Board suspended the appeal, pending the Court decision. In ruling favorably on defendant's Motion for Summary Judgment, the Court ruled on December 26, 1973 (amended February 1, 1974), that AT&T had failed to exhaust its administrative remedies. No appeal was taken from the Court's decision.

IBLA 74-150, Arizona Site: AT&T appeals the Arizona State Office decision dated November 7, 1973, which dismissed AT&T's protest and imposed increased charges for the Holbrook Junction site (AR 06350).

IBLA 74-336, Washington Site: AT&T appeals the March 4, 1974, Oregon State Office notice of rental revision for the Tekoa site in Washington (WASH 02500).

IBLA 75-230, California Sites: Following hearings on December 6, 1973, and June 3, 1974, the California State Office on October 29, 1974, issued a decision determining increased charges for 10 microwave sites. The sites and case numbers are Whitewater Mountain (R 530), Granite Pass (R 02414), Belle (R 02415), Turquoise (LA 0111884), Mountain Pass (LA 0113528), Kelso (LA 0166526), Glamis (LA 0168276), Hector (LA 0168775), Bess (LA 0170408), Lucerne (LA 0170409). AT&T and Pacific Telephone and Telegraph Company (PT&T) appeal.

The cases involve right-of-way easements granted to appellants pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1970), 43 CFR Subparts 2800 and 2861, for the purpose of establishing microwave communication sites and access roads. Such rights-of-way had originally been granted to appellants in the 1950's and 1960's. A charge was imposed for each right-of-way pursuant to 43 CFR 2802.1-7, which provides in part:

(a) Except as provided in paragraphs (b) * * * of this section, the charge for use and occupancy of lands under the regulations of this part will be the fair market value of the permit, right-of-way, or easement, as determined by appraisal by the authorized officer. * * *

(b) Except as provided in paragraph (c) of this section, [2/] the charge for use and occupancy of lands under the regulations of this part shall not be less than \$ 25 per five-year period for any permit, right-of-way, or easement issued.

Provision has also been made in section 2802.1-7 for the revision of the charges:

(e) At any time not less than five years after either the grant of the permit, right-of-way, or easement or the last revision of charges thereunder, the authorized officer, after reasonable notice and opportunity for hearing, may review such charges and impose such new charges as may be reasonable and proper commencing with the ensuing charge year. [Emphasis added.]

Under such regulation, the sites were reappraised and appellants notified that substantially higher charges would be imposed. See Appendices II & III, pp. 362, 363.

Wyoming, Arizona and Washington Sites

[1] As to the revised charges for the Wyoming, Arizona and Washington sites listed in Appendix II, we note that no hearings were held as required in section 2802.1-7(e), supra. That regulation requires notice and an opportunity for hearing as a matter of right prior to revision of charges. 3/ A specific requirement that a hearing be held before government action is taken is mandatory. Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316 (1961). In Texas Gas Transmission Corporation, A-29856 (January 14, 1964), the regulation herein concerned--formerly designated 43 CFR 244.21(e) (1963)--was construed by the Department:

Since the regulation plainly requires that these steps [notice and opportunity for hearing] be taken before rates are changed, it was improper to act without following the prescribed procedures.

2/ Paragraph (c) is not relevant here.

3/ The requirement of reasonable notice and opportunity for hearing was added in the 1954 amendment to the regulation, then designated 43 CFR 244.21(f).

The decisions as to sites in Wyoming, Arizona and Washington must therefore be set aside and the cases remanded for opportunity for hearing as set forth hereunder prior to imposition of revised charges.

California Sites

[2] The hearing for the California sites, in connection with the revised charges set forth in Appendix III, consisted of the appellants being offered the opportunity to present evidence and argument. So far as can be determined from the transcript, no Government case was presented on direct examination, nor was any Government argument presented. Appellants state that Lars H. Ericson, the BLM appraiser for the Lucerne, Bess, Hector, Turquoise, Mountain Pass, Kelso, Granite and Belle sites, and who approved the appraisals for the Glamis and Whitewater Mountain sites, testified on cross-examination only. His testimony, however, is not included in the transcript nor has any explanation thereof been furnished in response to appellants' comments. Statement of Reasons at 6.

It is not clear whether any BLM documentary evidence was formally introduced at the hearing, although reference was made to the above appraisals. While the BLM appraisals 4/ constitute a recognized part of the record on appeal, other evidence considered is in a different category. At 6, the decision refers to "a study completed in relation to the appeal mentioned above, and a separate report in the file * * *." Had these documents been better identified, the Board could have more readily determined whether they could be considered a part of the record under the doctrine of official notice. The file contains several post-hearing comments by various Government employees, which were apparently not furnished to appellants. On appeal, this Board will not consider post-hearing comments which have not been furnished to all parties. To the extent that the decision is based

4/ BLM made the following appraisals in connection with IBLA 75-230:

Appraisal Report, January 12, 1972, Roy H. Davidson, Appraiser, approved by Lars H. Ericson, Appraiser (Glamis site).

Appraisal Report, March 20, 1972, Lars H. Ericson, approved by Jean M. F. Dubois, Acting Chief, Division of Appraisal (Lucerne, Bess, Hector, Turquoise, Mountain Pass, Kelso, Granite and Belle sites).

Appraisal Report, October 19, 1972, (Whitewater Mountain). Appraiser's signature illegible. Approved Lars H. Ericson, Appraiser.

upon unspecified evidence not in the record and not made known to appellants, the decision is in error. See Morgan v. United States, 298 U.S. 468, 480 (1936); Garvey v. Freeman, 397 F.2d 600 (10th Cir. 1968); Moore-McCormack Lines, Inc. v. United States, 413 F.2d 568, 585-87 (Ct. Cl. 1969).

It would be helpful if more formal procedures had been followed at the hearing, including the formal introduction of the evidence of the case. The general procedures set forth in 43 CFR 4.430-4.438 would serve as an appropriate guide for conduct of the hearing. 5/

According to the evidence of the record, there is a critical difference between microwave sites and general communication sites. Microwave sites are designed only as links in a system and need only point to point coverage, or bi-directional line of sight clearance, while sites for general communications such as television or mobile radio transmitters require a high location for more general coverage. There is not always a necessity for high location of microwave sites, and the highest peak may be unsuitable because of being susceptible to possible interference. In making the site selections numerous possible locations were reviewed and appellants took into consideration such variables as line of sight clearances, access, development and power costs, land cost and land acquisition problems. Appellants contend, however, that there were many possible locations available for a microwave site between two other microwave sites, although the sites selected represented a composite of the most desirable combination of electronic suitability and cost factors. Appellants further asserts that there would be some changes in site location if a particular microwave net were to be reengineered today.

[3] Appellants' arguments regarding the California sites are directed against the appraisal procedures employed by BLM in arriving at the charges for use and occupancy of the microwave sites. In 602 Departmental Manual 3 it is required that the Government receive full value for disposition of public property. Appraisal standards for evaluating easements granted by the Department are set forth in Inter-agency Land Acquisition Conference, Uniform Appraisal Standards for Federal Land Acquisitions. 6/ In adopting the Uniform Standards for

5/ See, e.g., Goldberg v. Kelly, 397 U.S. 254, 267-71 (1970).

6/ 602 DM 1.3 provides:

"3 Uniform Appraisal Standards. The Interagency Land Acquisition Conference Committee on Uniform Appraisal Standards ha[s] developed and published 'Uniform Appraisal Standards for Federal Land Acquisitions' for the expressed purpose of obtaining uniformity among the various agencies acquiring property on behalf

Bureaus which dispose of property, the Department has recognized that determinations of value under the law of eminent domain are based upon hypothetical transactions between a willing, informed seller and a willing, informed buyer. Regardless of whether the Government is a condemnor or the grantor of a communications site, the standards for ascertaining the fair market value of the property are the same. In applying the Uniform Appraisal Standards to the grants of communication sites, proper consideration should of course be given to the different relationships of the parties and the different purposes of the transactions.

[4] "Fair market value" is set forth in section 2802.1-7(a) as the standard to be employed by the Department 7/ in determining appropriate use and occupancy charges. The parties agree that fair market value under the section is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the right to use the site would be granted by a knowledgeable owner

fn. 6 (continued)

of the United States. The appraisal standards developed are equally applicable to those bureaus that dispose of property on behalf of the United States. The publication * * * has been accepted by the Department as a handbook of the Departmental Manual and its standards are to be used as a guide by all bureaus and offices." (Emphasis added.) Uniform Appraisal Standards (1971) was reissued in 1973 without pertinent change.

7/ In Mountain States Tel. & Tel. Co. v. United States, 499 F.2d 611, 617 (Ct. Cl. 1974), "value of investment" was upheld as a proper measure of "value of use" in establishing charges for communication site special use permits granted by the Forest Service:

"Besides being flexible, the 'value of the use' standard is also equitable. This system for charging microwave-relay-site permit fees has existed unchanged for nearly 30 years and has been uniformly applied to all users. The fee that a potential user of the public domain could be charged is easily calculable. With advance knowledge of this cost, an individual is free to either accept or reject use of the national forests.

"The Secretary, through the Chief of the Forest Service, acted consistently with the considerations behind 36 CFR 251.3(a), as enumerated above. By utilizing 'value of the investment' as the measure for the 'value of the use' of national forest land as electronic sites, the Secretary has properly applied the regulation.

* * * * *

"We place emphasis on the phrase 'value to the recipient.' Although said [31 U.S.C. 483a] is only permissive in nature, it shows that fair market value is not the only test. Aeronautical Radio, Inc. v. United States, 335 F.2d 304 (7th Cir. 1964), cert. denied, 379 U.S. 966 (1965)." See also 36 CFR 251.1(c)(3).

willing but not obligated to grant to a knowledgeable user who desires but is not obligated to so use. ^{8/} See Uniform Appraisal Standards, *supra*, 3. The Standards further provide:

[C]onsideration should be given to all matters that might be brought forward and reasonably be given substantial weight in bargaining by persons of ordinary prudence, but no consideration whatever should be given to matters not affecting market value. Id. at 3-4.

[5] Fair market value of the site may be determined by a number of methods. The method used by BLM to determine fair market value in each instance was by comparing the subject sites with various communication sites under lease. Such method has been recommended by the Associate Director, BLM, as the preferred method for use in appraisal of communication sites. See BLM Instruction Memorandum No. 73-295, dated July 13, 1973. ^{9/}

Appellants are correct in their argument that such an approach is proper only where there is current, well-established rental data for comparable property. Appellants argue that comparable data was not available to BLM and, therefore, the comparable lease method should not have been used. Instead, sales of comparable land should have been compared to arrive at a market value for the site, which value should then have been converted to a fair market rental value based upon a reasonable rate of return. Appellants' approach to value results in charges greatly divergent from those determined by the BLM.

[6] Appellants contend that even though the sites were improved as of the revaluation date, the reappraisals must be conducted as though the land were unimproved as found prior to the date of appellants' use and occupancy or the date of the communication site grant, whichever was earlier. If at the time of the grant the subject sites were unimproved land, appellants argue that--for all purposes affecting appellants--the sites should be so valued during the 50-year term of the original grant. Appellants do not contend that the charges must remain fixed for the

^{8/} Counsel for the Government argues the importance of the 1961 amendment of section 244.21(a), substituting "fair market value of the * * * right-of-way" for "value of the land." This amendment, however, is not considered dispositive.

^{9/} The Memorandum expired December 31, 1974, but has not been superseded by a Manual Release. The appraisals and decisions herein were prior to said date.

life of the grant, but rather that the subsequent reappraisals should not be influenced by certain improvements, such as access and power, added at appellants' expense. Appellants are primary users of nonexclusive easements. Were appellants secondary users of the sites, they admit that it would be reasonable for the charges to reflect that the sites were improved. 10/

Appellants and the Government agree on the principle that, under section 2802.1-7(e), the value of costly improvements which appellants added to the site during the period of the grant should not be reflected in higher charges to appellants. The hearing officer's decision states at 5:

[T]he property should be considered in the raw land physical state without improvements as it was prior to development by the company.

This approach is in harmony with Uniform Appraisal Standards, supra at 6, in which it is stated that under the general rule in condemnations "[w]hen the appraisal is made after the taking, no consideration whatever should be given to physical changes, particularly improvements made by the condemnor * * *." The Board agrees that on reappraisal under the regulation appellants cannot reasonably be charged for the

10/ During the hearings concerning the California sites Mr. Verne Cox, an independent real estate appraiser, testified as a witness for appellants and referred to primary and secondary users. To avoid any misunderstanding concerning the terms, he addressed to PT&T a letter which was forwarded to the California State Office, BLM, on June 11, 1974. Therein, he explained: "Where the record shows that I used the term PRIMARY USER it is meant to mean the first occupant on a particular microwave site location and under my use of the term there can only be one PRIMARY USER. Where I used the term SECONDARY USERS it is meant to be any subsequent occupants of the same microwave site who enter on the site and construct their own facilities."

While our use of the terms primary user and secondary user follows the definitions set forth by Mr. Cox, we realize that the primary user might not in all cases be the first to construct particular improvements on the site. For example, the primary user might build an access road, yet have an on-site generator sufficient only for its power needs. A secondary user requiring power might run transmission lines to the site. In such a situation under the arguments advanced by appellants, since the site did not have power available to the secondary user, the "state of condition" of the site, for the purposes of appraisal for the secondary user's rental, would be a site with access but without power.

value their costly improvements may have imparted to the sites. 11/ The reappraisal should be based upon the physical condition of the right-of-way at the time the user properly commenced occupancy or at the time of grant thereof, whichever was earlier, with value adjusted to present value in that condition.

[7] Appellants and the Hearing Officer are also in accord that it would be proper to reappraise a site based upon a determination of a new higher or better use, provided that the use is not based upon the user's improvements during the lease. The Board also considers this to be a reasonable interpretation. 12/

The fundamental issue concerns appellants' contention that, despite BLM disclaimer, appellants' improvements were charged against them in the determination of the "highest and best use" of their sites. Such "use" is defined in Uniform Appraisal Standards, supra at 7:

By highest and best use is meant either some existing use on the date of taking, or one which the evidence shows was so reasonably likely in the near future that the availability of the property for that use would have affected its market price on the date of taking and would have been taken into account by a purchaser under fair market conditions. 19/

19/ Olson v. United States, 292 U.S. 246, 255 (19[34]).

The likelihood of such use must therefore be such that it adds to the value in the open market. See 124 A.L.R. 914.

In the comparable transaction approach to appraisals, similarity of highest and best use is basic. Uniform Appraisal Standards at 9. BLM's use of rental data is based on the determination

11/ This approach is in accord with the "hindsight" rule. While that rule is ordinarily considered as applicable to condemnation cases only, its general use under the circumstances is provided for in 602 DM 1.3, supra note 6, and Uniform Appraisal Standards cited above. In the decision at 5, the Hearing Officer apparently relied upon El Paso Natural Gas Company, A-30528 (August 25, 1965), and held the hindsight rule to be inapplicable. The 1965 decision was promulgated, however, before 602 DM 1.3; the ruling therein should therefore be distinguished.

12/ Such factors as inflation or deflation and changing rentals or value of comparable properties would also be reasons for revising charges.

that the highest and best use of the appellants' sites is for communication purposes, and the Bureau concludes that the fair market value can best be ascertained by comparing appellants' sites with other communication sites.

Appellants argue that such a determination of highest and best use can only be based on their improvements to the sites. Appellants contend that their sites are like numerous other peaks and ridges in the area, and in the absence of their improvements, the sites have no distinctive features which warrant a determination that the highest and best use is for communication purposes. Appellants assert that in most instances, the highest and best use for the subject sites in an unimproved state would be for interim holding, *i.e.*, acquisition of property for future speculative gain. No use for the lands other than for communication sites or "interim holding" is mentioned in the record. 13/

In applying the above rules to the individual sites, the said Instruction Memorandum makes it clear that a conclusion as to a revision in highest and best use must be supported by a discussion of specific facts. The Memorandum, at Encl. 1-2, 1-3, 1-4, provided for the following additional procedures:

2. Adjustment Factors

Differences between sites can be identified and, by careful analysis, local adjustments can be made for them. None of the various site classification systems appear to be adequate to identify characteristics that consistently result in universally quantifiable value (rental) changes for sites. However, site characteristics must always be checked for their influence when making comparisons with a subject site; they are:

- a. Coverage or electronic flexibility of the site.
- b. Location - market served, competitive alternatives, etc.
- c. Accessibility for construction, maintenance and security.

13/ Holding land as an investment for future rise in value has been recognized as a highest and best use where there is an active market for comparable land in anticipation of development in the foreseeable future. Rocca v. United States, 500 F.2d 492, 495, 502 (Ct. Cl. 1974); State v. Whitlow, 243 Cal. App. 2d 504, 52 Cal. Rptr. 336 (3d. Dist. 1966). In such cases, however, there is an indication in each record as to at least one purpose to which the property could be devoted in the future.

- d. Electric power availability.
- e. Physical character of the site and its influence on construction, operation and maintenance.

The proposed use is not a basis for classification or adjustment, but the adequacy of the subject site as a location for various types of communication facilities is a basis. * * * [Cf. procedure 8, infra.]

3. Rights Conveyed

a. * * * It is clear that great care must be exercised in using private leases as comparables. Detailed information about the provisions of the lease must be obtained to make accurate comparisons with BLM provisions possible. Therefore, it is recommended that a copy of the lease or option to lease be obtained wherever possible on private lease comparables, and that its provisions be related, point-by-point, to BLM grants.

* * * * *

6. Highest and Best Use

The appraiser's conclusion as to the highest and best use is not an end in itself. It is a step in the appraisal process which guides the appraiser in the selection of comparable leases. Care must be exercised in the analytical process required to reach the conclusion of highest and best use for the subject land. However, even greater care is necessary in selecting comparable leases. Obviously, the presence of, or proposal, to locate communication facilities on a given site does not necessarily confirm that its highest and best use is as a communication site.

The considerations previously enumerated in 2a and b can assist in evaluating the merits of the particular site. The importance of disclosing the specific facts and reasoning involved in reaching the conclusion of highest and best use in the narrative cannot be over-emphasized. A general discussion of the desirable characteristics of a communication site is not persuasive and is not adequate support for the highest and best use conclusion for a specific site.

* * * * *

8. Type of User-Influence on Fee

The proposed use should have no influence on the estimate of the use fee. The features and characteristics of the site determine its usefulness for this, or any other use, and the fee will vary according to the desirability of those features. The type or name of the proposed or existing user should have no influence on the fee. [Emphasis added.]

While the BLM approach of using comparable lease data to arrive at fair market value for microwave transmission sites is quite proper, an examination of the record herein does not lead to the conclusion that the data used by BLM was comparable except in very limited instances. Neither is it clear that copies of the assertedly comparable leases were obtained and compared. In the instances where improved sites were chosen, it is not always clear at whose expense improvements were made on the sites. In addition, the extent to which allowances were made for improvements provided by the lessees cannot be established from an examination of the BLM appraisals.

The file shows that, after the hearing, BLM reconsidered the appraisals. On January 31, 1974, Lars H. Ericson--the appraiser who had prepared or approved all the California BLM Appraisal Reports herein and who was the only Government witness to testify--concurred in the following statement:

In the course of the hearing the appellant made a repeated point that the sites had been compared with improved sites. In some cases this is true, and to the extent that it is true constitutes an error in the BLM report. According to the recent Communication Site Study, WAR sheet No. D-141, page 21, "it appears that consideration of the "unimproved" status of the site at the time of development by the first user should continue throughout his tenure." 14/ [Emphasis added.]

A review of the BLM appraisals also discloses that various factors, such as location, power, access, and intensity of use, were taken into consideration to some degree in evaluating the sites. However, different appraisers gave different weight to

14/ Memorandum from F. B. Bruin, Appraiser, to Chief, Branch of L&M Operations, "PT&T-AT&T Hearing Review of Transcript," January 22, 1974.

the various factors, and occasionally the same appraiser held certain factors important in one instance and not in another. 15/

It could well be that the owner of an unimproved site clearly suitable for communications purposes would include such possible use as a factor in his sale price, particularly since no other active use for any of the areas appears in the record. However, the sites under reappraisal cover a 150-mile wide area of Southern California. The record is not clear as to the "near future" demand for sites in relation to the supply of adaptable properties. See Uniform Appraisal Standards, supra at 7. It cannot be said whether it is so reasonably likely that any particular property would be selected as a communication site in the absence of improvements that its availability for communication site use would have affected market price and a purchaser under fair market conditions would have taken such likelihood into account. The present record is therefore inadequate to sustain the conclusion that the highest and best use of the appellants' sites is for communication purposes.

[8] By providing such improvements as access or power, the primary user may make the remaining Government property interest more desirable for the Government or for secondary users. Contrary to the views expressed in the March 22, 1972, appraisal and in the hearing officer's decision at 6, an improved site may be of great value to a secondary user. See Instruction Memorandum No. 73-295 at Encl. 1-2, supra. Clearly, it is usually cheaper to locate a communication site near existing facilities than to pioneer a site by road construction and development of power. The Government requires of such secondary users a higher initial charge based on the improved conditions of the site. In condemnations, under the "before and after" rule, any enhancement of value of the property interests retained by the Government must be considered as a benefit to the Government in reappraisal of a primary user's grant. See Uniform Appraisal Standards, supra, 18-20:

While the valuation is to be as of the date of taking, the benefit from the project must be taken into account. This is accomplished by applying the "before and after" rule, i.e., determining the market value of the entire tract at the time of the taking, excluding any enhancement or diminution from

15/ Compare the March 20, 1972, BLM reappraisal for 8 California sites with the January 3, 1972, BLM reappraisal for the Glamis site and the October 12, 1972, BLM reappraisal for the Whitewater Mountain site.

the project, and the market value of the remainder, including enhancement or diminution from the project. Sales of similar property in the area before and at the time of the taking and after the taking (to establish the after value) will normally demonstrate whether the project has enhanced or diminished area property values and will serve to eliminate claims of speculation and conjecture.

The extent of the benefit to a tract caused by the project is a fact question and the appraiser should be prepared in this respect.

* * * * *

There are many situations in which attorneys and appraisers should immediately think in terms of offsetting benefits, e.g., where the project has caused the remainder to have * * * frontage on a better road, more convenient access, * * * any upgrading of the highest and best use of the remainder such as causing formerly residential property to be a prime site for a shopping center. [Footnotes omitted.]

Instruction Memorandum No. 73-295, at Encl. 1-4, sets forth the following procedure in connection with Government grants of communication sites:

7. Damages and Special Benefits

Both damages and special benefits [see Uniform Appraisal Standards at 20] must be considered in appraising a communication site. Although the communication site itself has the characteristics of a site, the associated access or powerline right-of-way may have the effect of severing or benefiting the remainder parcel. A before and after approach should be used in measuring the magnitude of these factors. If damages outweigh benefits, payment should, in most cases, be in one lump sum at the inception of the permit. The basis of the estimate must be carefully documented. [Emphasis added.]

The record is unclear as to whether the above principles of the Uniform Appraisal Standards and Instruction Memorandum No. 73-295 are applicable to the facts herein. It will be noted that the "before and after" rule is in harmony with 602 DM 3.1, supra.

as to receipt of full value for public property, i.e., under the Memorandum the site and right-of-way are exchanged for the term of the grant in return for any benefit to remaining Government land and the charge for use and occupancy.

[9] Appellants may be able to furnish studies which show in detail why each particular site was selected, which studies would be most helpful in determining the highest and best use of such site. Data may be presented regarding comparable values in the vicinity. See Uniform Appraisal Standards, supra, at 9. The comparable lease method may continue to be used as the preferred approach if there exists adequate data which is reasonably comparable. In the absence of better evidence of market value, comparable sales and the "before and after" method of appraising easements should also be employed. Uniform Appraisal Standards, at 34.

The California cases should be remanded for opportunity for proper hearing, as discussed infra, before any revision of use and occupancy charges.

Consolidated Hearing

[10] Appellants herein request a consolidated hearing under 43 CFR 4.415. That section authorizes the Board, in its discretion, to order a hearing before an Administrative Law Judge. Appellants contend that such a hearing is important because the issues involve general appraisal standards and criteria for evaluating appraisals employed by the Bureau throughout its operations, and not in just one State Office. The Board agrees that the standards and criteria used for all land under supervision of the Department should be as uniform as practicable, and that important precedents are involved. Appellants also contend that separate hearings at the different State Offices would be time-consuming and expensive. The Bureau has not interposed an objection to the request for consolidated hearing under section 4.415. Without ruling that in other cases the hearing under section 2802.1-7(e) must be before an Administrative Law Judge, the Board agrees that in these cases the public interest would best be served by consolidation 16/ and hearing before an Administrative Law Judge under

16/ The Administrative Law Judge is encouraged to expedite the matter by incorporation of portions of the record of the previous hearing. He is authorized to grant any motions for severance of the consolidated hearing if it becomes appropriate under the circumstances.

section 4.415 prior to imposition of new charges. Following the hearing, appellants and BLM will be given the opportunity to present proposed findings of fact. The Judge will present his proposed findings of fact to the Director, BLM, or to the authorized officer designated by him, who will then establish any new charges reasonable and proper under the regulation. 17/

The consolidated hearing would be held upon the following issues, together with other issues deemed relevant by the Judge:

1. What is the highest and best use of each of the sites, without consideration of user's improvements?
 - a. Apart from user's improvements, are there reasons why each site is particularly adaptable for communication site purposes?
 - b. Apart from the fact that each site was selected and improved for communication site purposes, is there such a likelihood of communication site use that it would increase the value of the particular site in the open market?
2. As to each site, is there sufficient data available that the comparable lease method of appraisal is the most reasonable?
 - a. As to each site, what is the appropriate area from which data as to comparable transactions may be obtained?
 - b. What adjustments should be made in comparing the data from comparable sites?
3. If comparable lease data as to a particular site is not available, what is the value to be ascribed the site using comparable sales and the "before and after" method of appraising easements?

17/ The Director, BLM, or his authorized officer is designated by the Board to receive the record and proposed findings for the Board under section 4.439. The Board will reserve its review of the matter until receipt of any further appeal.

4. Were the appraisals made on the basis of provision 7 of Instruction Memorandum No. 73-295, and paragraph A-10 of the Uniform Appraisal Standards at 18-19?

5. What is the reasonable and proper annual charge for each site and access rights-of-way under 43 CFR 2802.1-7(e)?

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1 and 4.415, the decisions are set aside and the cases referred to the Hearings Division, Office of Hearings and Appeals, for assignment to an Administrative Law Judge to provide opportunity for hearing prior to imposition of any new charges by the Bureau of Land Management.

Joseph W. Goss

Administrative Judge

I concur:

Frederick Fishman
Administrative Judge

I concur in the result:

Douglas E. Henriques
Administrative Judge

APPENDIX I

<u>IBLA 72-336</u>	<u>EASEMENT DESIGNATION</u>	<u>APPELLANT</u>
WYO 0165715	ROCK RIVER	American Telephone
WYO 0165717	CRESTON	and Telegraph
	Company (AT&T)	
<u>IBLA 74-150</u>		
AR 06350	HOLBROOK	AT&T
<u>IBLA 74-336</u>		
WASH 02500	TEKOA	AT&T
<u>IBLA 75-230</u>		
R 530	WHITEWATER MTN.	PT&T
R 02414	GRANITE PASS	PT&T
R 02415	BELLE	PT&T
LA 0111884	TURQUOISE	PT&T
LA 0113528	MOUNTAIN PASS	AT&T
LA 0166526	KELSO	AT&T
LA 0168276	GLAMIS	AT&T
LA 0168775	HECTOR	AT&T
LA 0170408	BESS	AT&T
LA 0170409	LUCERNE	AT&T

APPENDIX II

Initial Charges and Proposed Revised Charges for Microwave Sites in Wyoming, Arizona and Washington

	<u>Initial Charges</u>		<u>Present Charges</u>		<u>Prop'd Rev'd Charges</u>
	<u>on Appeal</u>				
<u>Site</u>	<u>Date</u>	<u>Amount</u>	<u>Date</u>	<u>Amount</u>	
IBLA 72-336					
Rock River	9/21/61	\$ 55/yr.	10/66	\$ 110/5 yrs.	
(WYO 0165715)					
Creston	9/21/61	\$ 55/yr.	10/66	\$ 106/5 yrs.	
(WYO 0165717)					
IBLA 74-150					
Holbrook Junction					
	5/25/54	\$ 50/yr.	9/17/63	\$ 25/5 yrs.	
(AR 06350)					
			6/13/67	\$ 290/5yrs.	
IBLA 74-336					
Tekoa *					
(WASH 02500)					
	4/2/58	\$ 55/yr.	11/27/63	\$ 1,672.80/5 yrs.	

* Two other BLM appraisals were made on the Tekoa Site:

12/16/68 \$4,167.65/5 yrs.
 8/1/73 \$4,300/5 yrs.

Apparently, neither of the revised rentals were imposed by BLM.

APPENDIX III

Case IBLA 75-230

Initial Charges and Proposed Revised Charges for California Sites					Initial	Previously
Proposed	Revised Charge	Proposed Rev'd	Charge	Revised Charge		Charge on
App.						

Site Date Amt/Yr. Date Amt/Yr. Date Amt/Yr. Date Amt/Yr.
Turquoise 3-08-54 \$ 50 1-1-63 \$ 500 * 6-14-65 \$50 5-18-72 \$60
(LA 0111884)

Mountain 4-09-54 \$ 50 1-1-64 \$ 500 * 6-14-65 \$50 5-18-72 \$350
Pass
(LA 0113528)

Kelso 1-19-60 \$ 60 1-1-62 \$ 500 * 6-14-65 \$50 5-18-72 \$225 (LA 0166526)

Hector 12-12-61 \$ 55 1-1-62 \$ 500 * 6-14-65 \$50 5-18-72 \$450
(LA 0168775)

Bess 12-12-61 \$ 60 1-1-62 \$ 500 * 6-14-65 \$50 5-18-72 \$400 (LA 0170408)

Lucerne 12-12-61 \$ 65 1-1-62 \$ 500 * 10-14-65 \$300 5-17-72 \$575
(LA 0170409)

Glamis 2-20-65 \$ 300 1-21-72 \$1200
(LA 0168276)

Granite 2-01-64 \$ 50 5-18-72 \$250
Pass
(R 02414)

Belle 3-20-63 \$ 50 5-18-72 \$450
(R 02415)

Whitewater 1-03-68 \$ 300 11-8-72 \$500
Mtn.
(R 530)

* When Pacific Telephone and Telegraph Company learned of the BLM 1965 reappraisals for the six sites, it appealed the increased charges. Appellant filed appraisals made by an independent appraiser. On March 24, 1964, after reviewing the Bureau's and appellant's appraisals for the six sites and two others, the Chief, Division of Appraisals, BLM, informed the State Director, California, that:

The Bureau has not established that the highest and best use for the subject sites is for communication purposes. The mere fact that the appellant chose certain sites upon which to place his radio relay installations does not mean that there were not a large number of other sites in the immediate vicinity which would have been equally as suitable. In engineering the system, the sites may have been chosen arbitrarily from among all these sites. This would be analogous to a powerline or a pipeline across open country. Such lines are engineered also, but those planning the system have a wide choice of sites from which only one will be picked.

The Bureau appraisal states that the four major factors affecting value of communication sites, in order of priority, are location, access, power and service ability. The report, however, does not compare the leases used to estimate the value with the sites appraised in any of these factors.

The Bureau report is a blanket appraisal of all communication sites in southern California. The enclosed appraisals submitted by the appellant cast considerable doubt as to whether this is the proper method at least with regard to the eight sites in question.

Thereupon, except for the Lucerne site, BLM imposed charges of \$ 50 per site rather than \$ 500. The Company requested dismissal of those appeals, and on June 14, 1965, the Chief, Office of Appeals and Hearings, BLM, issued a decision of dismissal.

As for Lucerne, the Chief, Office of Appeals and Hearings, issued a decision on October 14, 1965, reducing the charges from \$ 500 to \$ 300. This determination was accepted by the Company.

From the charges settled upon, it would appear that the sites, except for Lucerne, were considered as low value Class III sites in 1965. In The Pacific Telephone and Telegraph Company, Los Angeles 0170409 (October 26, 1965), the three classes of sites were discussed:

The reappraisal report lists three separate classes of communication sites within the Riverside District and the appraised annual rental value of each as follows:

(Local ~~"Class I Multiple Use Metropolitan Sites"~~) \$ 300 to \$400

"Class II Multiple Use Remote Sites with \$ 200 to \$ 300

Definite Site Values

(Pronounced peaks or other lands with definite site values which are generally remotely located with respect to population centers)

"Class III Single Use Sites \$ 50

(Transcontinental and related communication systems - no definite or pronounced site values). [Emphasis added.]

ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN THE RESULT:

In the absence of objection from the Bureau of Land Management and good reasons offered by appellants, I join in granting appellants' request for a consolidated hearing in these particular cases. As appellants have indicated, there are general issues relating to the application of appraisal standards by different Bureau of Land Management officials throughout the different states involved. I agree with appellants that these matters can best be resolved after a further hearing in the California cases and a hearing in the other cases involved in this decision.

The appeal brief for the Bureau of Land Management before this Board recognized the applicability of appraisal standards for the Government's acquisition of property to disposal of property "provided that consideration is given to the differing purposes of the transactions and differing relationships between the parties." (Brief at 4.) The extent to which differences are to be recognized in applying certain appraisal standards and concepts in these appraisals is a matter in issue in these cases and can best be resolved only after this consolidated hearing is held and a proper factual basis can be made from which to draw our conclusions. I believe this issue should be explored further. Likewise, it is premature to make factual findings on matters still in issue and which should be explored further at the hearing. Therefore, I cannot agree with certain conclusory statements in Judge Goss's opinion.

The Bureau decision in the California cases indicated a study revealed there were no differences in rental rates between improved and unimproved sites. Among the issues which should be explored at the hearing, I submit, are the following:

1. What differences, if any, are there in rentals in the market place for communication sites where the sites have been improved and where the land is unimproved?

- a. What differences, if any, are there in rental rates for the first user (primary user) of a site who improves it, and that rate charged in the market place to secondary users who may have the benefits of developed access or electrical power unavailable until the first user developed the site?

2. In using the comparable lease rental approach, or appellants' proposed method of appraisal, what is the basis for constituting an "area" covering sites to be used in making comparisons of value?

3. In a given "area" how many other possible sites suitable for microwave relay transmission sites could be used and what effect does this have in relation to meeting the "highest and best use" test and impact on market prices?

4. In each appraisal case does the Bureau's appraisal meet the proper appraisal standards?

Joan B. Thompson

Administrative Judge.

